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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,
v.
JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONER

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INTRODUCTION

Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer defined benefit pension trust fund established in 1955 by affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"). Central States is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). Central States is administered for the exclusive benefit of the participants to whom the

Trustees owe an undivided duty of loyalty. The purpose of the Central States pension plan is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the plan.

Under the plan participating employers contribute to Central States pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. Employees earn credit (accrued benefits) for covered work periods and after earning 10 years of credit, become vested in the benefits. The plan covers 164,000 retirees currently drawing benefits and 238,000 active participants.

Central States is the largest multiemployer pension plan in the United States with assets of $11.733 billion and vested benefit liabilities of $13.768 billion. Central States' unfunded vested benefits ("UVB") are thus $2.035 billion. The UVB is not immediately due because the liabilities represent the present value of benefits payable over many decades into the future. The expected time to amortize the UVB at current funding rates is about 21 years. The principal means for funding the UVB, as well as for funding current benefit accruals, is the contributions of employers made pursuant to their collective bargaining agreements. Central States presently receives contributions from over 5,000 employers through 9,164 billing accounts from 42 states and Canada.[1]

Additional funding is required by statute when an employer withdraws (ceases to have an obligation to contribute) from Central States. This withdrawal liability is an employer's pro-rata share of the UVB. Withdrawal liability is payable in installments with interest ("amortized," to use the statutory term). *See* generally Subtitle E of Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1381, *et seq.* As

[1] A billing account is generally assigned to each collective bargaining agreement. Some employers are subject to more than one agreement.

of October 31, 1993, Central States had 283 outstanding assessments of withdrawal liability totalling approximately $290 million. Of these 86 occurred in 1993 in the total amount of $42 million. Since September 26, 1980,[2] Central States has collected about $370 million in withdrawal liability.

Central States' withdrawal liability program, other than its size, is similar to Petitioner Milwaukee Brewery Workers' Pension Plan. Due to its size, however, Central States brings a somewhat broader perspective to consideration of certain issues such as that presented in Question 1 of the Petition. Central States files this brief *amicus curiae* in support of Petitioners on Question 1.

INTERESTS OF CENTRAL STATES

In the decision below the United States Court of Appeals for the Seventh Circuit ruled that in calculating and collecting withdrawal liability Petitioners, a multiemployer pension plan like Central States may not apply an amortization charge (interest) to the first annual billing cycle. *Schlitz v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3378 (U.S. Nov. 12, 1993) (No. 93-768). This decision is directly in conflict with an earlier decision of the Third Circuit in *Huber v. Casablanca Industries*, 916 F.2d 85 (3rd Cir. 1990), *cert. dismissed*, —— U.S. ——, 113 S.Ct. 1070 (1993). The Fourth Circuit has also ruled in conflict with the Third Circuit on this question in *Borden v. Bakery & Confectionery Union Pension Fund*, 974 F.2d 528 (4th Cir. 1992). The Fourth and Seventh Circuits are not completely aligned, however, as we explain *infra*.[3]

[2] This is the effective date of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which added the withdrawal liability provisions of ERISA.

[3] Inexplicably the Seventh Circuit was "doubtful" of its conflict with the Third Circuit, but clearly joined the Fourth Cir-

This conflict among the circuits creates a problem of immense proportions for multiemployer plans like Central States that cover more than one federal judicial circuit. Which law should Central States follow? While Central States is administered in Rosemont, Illinois, within the Seventh Circuit, only 30% of its billing accounts are in the Seventh Circuit. Central States has actual or potential withdrawal liability in 42 states and in each of the eleven numbered judicial circuits. The following table illustrates the breadth of Central States' contributing employer base.

Circuit	Billing Accounts	Percent of Total
1	12	0.1
2	63	0.7
3	170	1.9
4	293	3.2
5	116	1.3
6	2,944	32.1
7	2,781	30.3
8	1,961	21.4
9	228	2.5
10	409	4.5
11	180	2.0
	9,157	100.0%

The conflict among the circuits presents an administrative nightmare to Central States because every withdrawal liability assessment is wrong somewhere. Nor does the location of the billing account resolve the dilemma on a case by case basis. Many contributing employers conduct operations across state, and judicial boundaries. Each of the five largest contributors to Central States does business

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cuit. 3 F.3d at 1004. The Fourth Circuit acknowledged the conflict with the Third Circuit. 974 F.2d at 536. The Third Circuit expressly held the entire first year amortization charge unlawful and reversed the district court and arbitrator rulings to the contrary. 916 F.2d at 99-100.

in virtually every judicial circuit as their number of billing accounts suggests:

Company	Billing Accounts
ABF Freight System, Inc.	132
Consolidated Freightways	173
Roadway Express	182
United Parcel Service (UPS)	101
Yellow Freight Systems, Inc.	150

UPS, for example, does business in every state and has billing accounts in 22 states located in seven judicial circuits.

For over 13 years since the enactment of MPPAA Central States has charged interest on the UVB it allocates to withdrawn employers.[4] The interest is calculated and applied once each year as an amortization charge that is built into the employer's withdrawal liability payment schedule. *See* 29 U.S.C. § 1399(c)(1)(A). Since the UVB is calculated as of the end of the year preceding the employer's year of withdrawal, yet the first annual installment is assumed due on the first of the year following the year of withdrawal, Central States applies a full year's amortization charge to the first payment.[5] *Id.* At the current rate of 8% this amounts to about $23 million of the current assessments. Central States has consistently (and uniformly among its withdrawn employers) applied this interest to over 1,000 withdrawals.

According to the Seventh Circuit the practice by a pension plan of applying an amortization charge to the first annual payment is wrong, at least to the extent the

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[4] The rate, as required by statute, is the same as applied to the determination of plan liabilities on a present value basis. *See* 29 U.S.C. § 1399(c)(1)(A)(ii).

[5] The payment is not literally due on that date. The schedule is abstract until the pension plan issues a demand for payment. The first year amortization charge covers the one-year period preceding the first payment date contained in the demand.

interest applies to the period preceding the employer's date of withdrawal from the plan, but such interest may (indeed must) be applied to all subsequent annual payments. If the court is right, then Central States has been wrong all along. The United States Court of Appeals for the Third Circuit has, however, reached the opposite conclusion. Under the Third Circuit ruling Central States has applied the amortization charge correctly.

Which decision should Central States follow? As far as the courts are concerned Central States should follow the right decision—the decision that governs the jurisdiction in which the inevitable lawsuit is filed. In other words the precise amount of withdrawal liability of an employer is unknowable until after commencement of litigation in a particular jurisdiction. Until that time there are at least two potentially correct amounts. Like a quantum particle, withdrawal liability exists in an indeterminate probabilistic state until it is measured in a particular way by the court.

This problem is exacerbated by ERISA's broad venue provisions. Venue is proper for withdrawal liability matters where the plan is administered or where a defendant resides or does business. 29 U.S.C. § 1451(d). While Central States is administered in Illinois, it arguably does business in at least the 42 states from which it has billing accounts. Since these states may be found in each of the eleven numbered federal judicial circuits, Central States cannot escape the conflicting law of these circuits.[6]

[6] Forum shopping will abound under this conflict. Employers, of course, will want to sue in the Seventh or Fourth Circuit. Central States will sue in the Third Circuit or any of the uncommitted circuits—most likely the Sixth or Eighth Circuit where more than half of the contributors are found. Success on this question will depend on who gets the jump on the opponent. The plan might file simultaneously with its demand for payment. The employer might file its declaratory action when it withdraws (before the plan sponsor has time to react). Perhaps the plan could anticipate withdrawals and file protective lawsuits to coincide with critical dates such as the expiration of collective bargaining agreements.

In sum the administrative and legal problems created by the conflict among the circuits on this amortization charge issue have, arguably, an even greater impact on Central States than on Petitioner. Many of the other 2,000 multiemployer pension plans will also be experiencing these problems to one degree or another. Central States, thus, serves as an apt example of why this conflict must be resolved immediately by granting the petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. STATUTORY PROVISIONS FOR AMORTIZING WITHDRAWAL LIABILITY HAVE BEEN GIVEN CONFLICTING INTERPRETATION BY THE THIRD, FOURTH, AND SEVENTH CIRCUITS.

The problem presented by the conflict among the circuits on Petitioner's Question 1 involves no less than a significant percentage of every withdrawal liability assessment ever issued by a multiemployer plan. This is because the issue is whether or not to charge interest for the first payment period of the withdrawal liability payment schedule. In Central States' case this is 8% of every assessment. In the Third Circuit this interest may, and thus must, be charged.[7] In the Seventh and Fourth Circuits it may not. The conflict is in the courts' interpretations of 29 U.S.C. § 1399(c)(1)(A) and in particular the meaning of the term "to amortize."

The statute provides that "an employer shall pay [its withdrawal liability] over the period of years necessary to amortize the amount in level annual payments. . . ." 29 U.S.C. § 1399(c)(1)(A)(i). To determine the payment schedule the plan first calculates the amount of withdrawal liability and the amount of the annual pay-

[7] Fiduciary obligations would prohibit plan trustees from gratuitously declining to collect interest where interest is permitted to be charged.

ment. Then interest is applied, and a payment schedule, similar to a mortgage schedule, results.[8]

The payment period is "calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs" and each subsequent payment were made on the anniversary date of the first. § 1399(c)(1)(A)(i). There is apparently no disagreement from any quarter that interest will accrue between these payments. This, after all, is what it means to "amortize" a debt.[9] There would be no conflict if the employer's share of the UVB were determinable as of the date of its withdrawal and its first payment were also due on that date. Interest would simply begin to accrue on that date against the unpaid principal, but the first payment would consist of principal only. It is on the period that precedes the first annual payment that the courts of appeals part ways.

The problem leading to the conflict is that plans cannot generally calculate the UVB as of the date of withdrawal. An actuarial valuation is necessary to the determination of the plan's UVB. This complex process takes place annually and is performed by the plan's enrolled actuary. 29 U.S.C. § 1023(d) and § 1023(a)(4). Recognizing this practicality the statute requires that withdrawal liability be determined as of the last day of the plan year

[8] This annual payment is independent of the withdrawal liability (roughly equal to the employer's pre-withdrawal annual contribution). § 1399(c)(1)(C). It may or may not be enough to amortize the employer's share of the UVB over a reasonable period of time. To prevent a problem of perpetual payments the statute abates any amounts payable beyond a 20-year period and defines withdrawal liability accordingly. §§ 1399(c)(1)(B) and 1381(b).

[9] The statute plainly contemplates that interest will be applied to principal in deriving this schedule. "The determination of the amortization period . . . shall be based on the assumptions used for the most recent actuarial valuation for the plan." § 1399(c)(1)(A)(ii). There is only one actuarial assumption that might apply to this kind of calculation—the plan's discount rate for future liabilities. This, then, is the interest rate (8% in Central States case) that plans use to amortize withdrawal liability.

preceding the year of withdrawal. *See e.g.*, §§ 1391(c)(2)(C) and 1391(c)(3)(A). Thus a single calculation of UVB takes place and applies to all withdrawals occurring in the following year. This requirement, however, produces a gap between the calculation date and the deemed first payment date.[10] The question is whether to fill the gap with interest. It is the practice of plans like Petitioner and Central States to adjust that withdrawal liability by applying a first year amortization charge to account for the gap between the calculation date and the assumed date of first payment one year later.[11] The Third Circuit saw no error in this practice. *Huber*, 916 F.2d at 98. The Seventh Circuit, however, was concerned that some of this period predates the withdrawal. Thus, arguably, interest is being applied to a period before the debt arose. *Schlitz*, 3 F.3d at 1004. That is one way of looking at it. Another view, however, is that the UVB of the plan is always a debt of the employer. For withdrawal liability purposes it is determined in the past and will have changed by the date of withdrawal and again by the first payment date. By applying interest to the intervening year Congress, and plans, could ensure that the employer's share of UVB was not held artificially low by the timing of the actuarial valuation process.

Central States favors the latter view. The payment schedule is a wholly artificial process, as the Seventh Circuit recognized. "MPPAA does not imply that withdrawing employers *owe* anything as of the end of the year before they drop out." *Id.* (emphasis in original). The

[10] It also produces a gap between the calculation date and the withdrawal date. The court below reserved the question of post-withdrawal interest. 3 F.3d at 1004. "An assessment of interest between the date of withdrawal and the date on which payments begin, in order to make the amortization schedule actuarially correct, would not be troubling." *Id.* The Fourth Circuit, by contrast, ruled against any pre-billing interest without distinguishing between pre- and post-withdrawal periods.

[11] This interest is, thus, sometimes called "gap year interest" and sometimes "first year interest."

UVB calculation is performed as of a date *before* the withdrawal. The payment schedule is derived as if the payments were made on the first year of each succeeding year. But the first payment is not actually due until the plan bills the employer. 29 U.S.C. § 1399(c)(2). In effect, then, the statute requires the plan to develop a payment schedule overlay. This overlay is then transferred to the actual first payment date, which is specified in (and will be later than) the notice of withdrawal and demand for payment that the plan eventually will send the employer. In some cases this could be years after the withdrawal.[12] The Seventh Circuit erred in taking the schedule too literally as if the first payment were actually made on the first day of the year following the withdrawal such that some of the interest would have accrued before the withdrawal. The Third Circuit correctly understood the abstract "immediate annuity" process at work. *Huber*, 916 F.2d at 98.

The following hypothetical payment schedules illustrate this conflict.[13] We assume that an employer's withdrawal liability for a June 30, 1993 withdrawal is $1,000,000, that its annual payment is $250,000, and that the payment is actually made on the first day of the plan year following the withdrawal.

[12] The Third Circuit case provides an apt example. Casablanca withdrew on December 31, 1988, in a partial withdrawal. The calculation of withdrawal liability requires an adjustment (proration) for the partial withdrawal. 29 U.S.C. § 1381(b)(1)(B). That calculation under 29 U.S.C. § 1386 requires knowledge of the next year's (post-withdrawal 1989) contributions. The assessment and demand for payment could not be made until 1990, more than a year after the withdrawal. Yet under the Third Circuit view only one year of interest accrues as of the first payment date (no matter how delayed) because the payment schedule is fixed "as if" payment began on the first day of the year following the withdrawal.

[13] The legislative history of MPPAA also contains a numerical example similar to Column III that incorporates the first year amortization charge. H. Rep. No. 96-869, 96th Cong., 2d Sess. 83 (*reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 2951). *See also, Huber*, 916 F.2d at 98, n. 30. As the *Huber* court notes, the example was not intended to illustrate the interest issue. It does, however, tend to show the drafter's mindset to treat withdrawal liability like an immediate annuity.

ALTERNATIVE PAYMENT SCHEDULE [14]

		I. Seventh & Fourth Circuits	II. Seventh Circuit Alternative	III. Third Circuit
Year 0	Initial Liability	$1,000,000	$1,000,000	$1,000,000
Year 1	Liability	1,000,000	1,000,000	1,000,000
	+Interest	0	40,000	80,000
	−Payment	250,000	250,000	250,000
Year 2	Liability	750,000	790,000	830,000
	+Interest	60,000	63,200	66,400
	−Payment	250,000	250,000	250,400
Year 3	Liability	560,000	603,200	646,400
	+Interest	44,800	48,256	51,712
	−Payment	250,000	250,000	250,000
Year 4	Liability	354,800	401,456	448,112
	+Interest	28,384	32,116	35,849
	−Payment	250,000	250,000	250,000
Year 5	Liability	133,184	183,572	233,961
	+Interest	10,655	14,686	18,717
	−Payment	143,839	198,258	250,000
Year 6	Liability	0	0	2,678
	+Interest	0	0	214
	−Payment	0	0	2,892

As noted the liability is not really owed as of December 31, 1992 (the calculation date) because the withdrawal had not occurred. Nor is the first payment really due on

[14] The Seventh Circuit joined the Fourth Circuit, which clearly takes the strong, no-interest view of Column I. The Seventh Circuit might allow interest to accrue beginning on the date of withdrawal, however, which would result in Column II. The period between Year 0 and Year 1, however, is variable and depends on when the plan issues its demand for payment. The gap period is often, if not generally, greater than one year. Since the Seventh Circuit might allow post-withdrawal interest, the first interest charge in Column II (Year 1) would exceed the Column III amount (of $80,000) in cases where more than one year passes between withdrawal and demand.

January 1, 1994 (although the schedule is calculated "as if" it were) but rather on some future First Day of Year 1, depending on when the demand is made. This schedule is simply the overlay. If this withdrawal had taken place on January 1, 1993, the employer would, under Column I, pay no interest for 1993 regardless of when the plan demands payment. If the withdrawal occurred on December 31, 1993, and a demand were immediately made, the employer would, under Column III, pay a full year's interest for one day.[15] These are rare extremes. Demands for payment are made only after the withdrawal is detected and referred to the plan sponsor for action. 29 U.S.C. § 1382. Payments commence months—sometimes years—after the withdrawal. Congress, however, was concerned only with precision in the calculation, not in the application of the schedule. As to actual payments, the law of large numbers applies to produce a rough equity. *Schlitz*, 3 F.3d at 1004.

Perhaps recognizing the problem of both under- and over-inclusiveness of interest represented by Fourth and Third Circuits decisions, respectively, the Seventh Circuit reserved decision on whether interest might apply from the date of withdrawal forward. Allowing such interest was, in fact, the position taken by the district court in *Huber* that the Third Circuit reversed. *See* 916 F.2d at 96. There is considerable logical merit to this approach since it protects plans from loss during any post-withdrawal period required to discover the withdrawal, calculate the liability, and issue the demand. If this is the correct method, then both the Third and the Fourth Circuits are wrong.

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[15] If the demand were not immediately made, no additional interest would accrue, however, under *Huber*. The Third Circuit ruled that pre-billing interest, that is interest on the period between the assumed first payment under the statute and the actual payment under the plan's demand, may not be charged. This obviously treats the statutory schedule strictly as an overlay. If the Third Circuit is wrong and the Seventh Circuit is right, then pre-billing interest from the date of withdrawal until the date payment is demanded should be allowed.

Central States believes that interest is properly charged to the first payment period. When the payment overlay is looked at in the abstract, it is obviously an immediate annuity with interest applied to each period, including the first. *Huber*, 916 F.2d at 98. This is Congress' meaning in the word "amortize." If it meant anything else it would have said so (*i.e.*, "the withdrawal liability is due on the [date of withdrawal] [or first day of the year following the withdrawal] and payable in level annual installments beginning on that date"). The post-withdrawal interest the Seventh Circuit might allow is also a reasonable reading of the statute. But, as we argue below, a definitive answer in either direction is necessary from this Court so that plans can carry out their statutory obligations. Thus the petition should be granted.

II. THE CONFLICTING DECISIONS PLACE AN UNACCEPTABLE BURDEN ON PENSION PLANS, CONTRIBUTING EMPLOYERS, AND THE COURTS AND SUBVERT STATUTORY PURPOSE.

A great deal of the complexity of the statute in dictating how plans are to calculate withdrawal liability is a result of Congress' desire to insure evenness in the application of the law to withdrawn employers. Plans have little discretion and must apply the law mechanically. *Huber*, 916 F.2d at 93. Indeed Congress provided expressly for government approval of plan amendments that affect the calculation of withdrawal liability. 29 U.S.C. § 1394. Such evenness, however, is no longer possible.

Because of the conflict in the circuits plans like Central States are faced with one statute but two meanings. Every calculation may be done at least two ways with no *a priori* correct way. Only after a lawsuit fixes the jurisdiction, can certainty be achieved and then only with respect to one specific calculation. The next withdrawn employer may—probably will—be subject to a different jurisdiction, a different law, and a different result.

The result, of course, of all this uncertainty is a heavy burden on the resources of the courts and of plans, even though Congress sought specifically to reduce the burden

on both. Thus, for example, Congress directed withdrawal liability disputes to arbitration first. 29 U.S.C. § 1401. Yet neither plan nor employer may risk waiting the results of an arbitration before filing suit. At a minimum one or two parallel, venue-confirming, declaratory actions will accompany every arbitration.

Further Congress sought to reduce collection costs for plans.[16] The conflict in the circuits virtually guarantees a longer, costlier process as plans defend their calculations in the conflicting jurisdictions. Only by capitulation to the Seventh Circuit view can plans avoid employer lawsuits on this issue. But of course that decision would require trustees to defend themselves from the fiduciary breach claims of participants and the Secretary of Labor and possibly from contributing employers, whose contribution burdens are increased by the capitulation.

CONCLUSION

For the reasons stated above this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

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[16] *See e.g.*, S1076 The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, Committee on Labor and Human Resources, United States Senate, 96th Congress, 2d Session, April 1980, at p. 21, disapproving "dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan."